In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, *et al.*,
Petitioners,

v.

SELBY OIL AND GAS COMPANY, *et al.*,
Respondents.

ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON

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To Said Honorable Court:

In order to determine if this is a "case or controversy" within Clause 2, Section 1, Article III, of the Constitution of the United States, the nature of the case must first be determined.

The Order of the Railroad Commission Involved is Quasi-Judicial

It has been held many times that the action of the Railroad Commission in passing upon an application for a permit, whether in granting or rejecting same, is not purely administrative, but to the contrary is quasi-judicial. *Producers Refining Company v. M. K. & T. Railway Company, 13 S. W. (2d) 679 (Com. App.); Texas Steel Company v. Fort Worth & Denver City Railway Co., 40 S. W. (2d) 79 (Com. App.); Johnson Refinery v. State, 85 S*

W. (2d) 949; Gulf Land Company v. Atlantic Refining Company, 131 S. W. (2d) 73, 81 (Sup. Ct.); Brown v. Humble Oil & Ref. Co., 126 Tex. 296; Magnolia Pet. Co. v. Railroad Commission, 96 S. W. (2d) 273, 275 (Sup. Ct.).

Texas Statutes Do Not Confine Review of a Railroad Commission Order to a State Court in Travis County

It has already been shown that action of the Railroad Commission is not purely administrative, but is quasi-judicial. *Article 6049(c), Section 8, R. C. S. 1925,** gives to any interested person who may be disatsified with the quasi-judicial action of the Commission, the right to "file a suit" in a court of "competent jurisdiction in Travis County, Texas, and not elsewhere" to "test the validity" of such quasi-judicial order. The statute does not restrict a review to a court of competent jurisdiction *of* Travis County, Texas, but gives the right to go into any court of competent jurisdiction *in* Travis County, Texas.

MacMillan v. Railroad Commission, 51 Fed. (2d) 400, 403, squarely holds that a suit making attack on an order of the Railroad Commission was properly brought in the Federal Court, citing *Reagan v. Farmers Loan & Trust Company, 154 U. S. 362.* There are many reported decisions of Federal courts wherein orders of the Railroad Commission of Texas were under attack. This court cited the *MacMillan* case (upon another point) in the *Rowan & Nichols* Case, *310 U. S. 580.* The case of *Peoples Petroleum Prducers v. Smith, 1 Fed. Supp. 361*, was also a case in which an order of the Railroad Commission of Texas was involved in a Federal court suit, and that decision was cited

* Copied in Appendix.

by this court (upon another point) in the *Rowan & Nichols Case, 310 U. S. 580.*

If the Texas Legislature had intended to restrict reviews of the orders of the Railroad Commission to state courts in Travis County, it might have easily said so. It is beyond cavil that a Federal District Court *in* Travis County is a court of "competent jurisdiction", provided the requisite amount and diversity exists, or if constitutional questions are involved. Neither Section 10 nor Section 11 of *Article 6549(c), R. C. S. 1925,** detracts from this view. Section 10 is a restraint against issuance of injunction against the Commission, except after notice. It is significant that Section 10 provides that after the petition is filed "the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing". If it had been intended by this language that only the clerk of the state district court in Travis County could issue such notice, then appropriate words to that effect might have easily been used. There is nothing in the language of Section 10 calling for such action by the clerk of a specific court other than of the court where the suit is filed. Section 11 provides that in the case of an appeal, same shall at once be returnable "to the appellate court". The Legislature well knew that the state "appellate court" for Travis County was the Third Court of Civil Appeals at Austin. Had it intended that such appeal should go to said court, the Legislature would have said that the appeal should have been returnable at once to "the Court of Civil Appeals" for said county, or to the "Third Court of Civil Appeals", or used other specific, identifying language. It is

* Copied in Appendix.

only when such appeals are taken to the Court of Civil Appeals or to the Supreme Court that other provisions of Section 11 are applicable. The act specifies what shall be done in the event the appeal is to a state appellate court only, but does not attempt to expedite appeals except when through the state court.

Should an order of the Railroad Commission be invalid, it adversely and directly affects an adjoiner to the extent that such adjoiner must either move to invalidate such order by judicial decree, or risk his chances of being granted an opportunity to protect himself against such invalid order by similar treatment at the hands of the Commission, or must lose whatever property rights may be taken from him by such invalid order. It would therefore be improper to say that an "interested person" is only affected indirectly, particularly where he might show hurt or injury to valuable property rights should a given order of the Commission stand. The right "to test the validity" of an order of the Railroad Commission means the right to test the legality of such an order. The right to test legality, where a property right is involved, is a substantial right and one calling for judicial and not administrative determination.

A Suit to Test the Validity or Legality of a Railroad Commission Order is a "Case or Controversy" Within the Meaning of Article III of the Constitution of the United States

Determination of "validity" or "legality" of an order of the Railroad Commission is not simply ancillary or advisory but is a judicial determination rendering final the

disputable issues raised by the pleadings and evidence. A proceeding making an attack upon an order of the Railroad Commission has been held to be susceptible of judicial determination. This makes of such proceeding a "case" or "controversy" within the meaning of the Constitution. *La Abra Silver Mining Company v. United States, 175 U. S. 423, 457;* and *Matter of Facific R. Commission, 32 Fed. 241, 255.*

In such a suit there is presented the legal rights of adversary parties, even though the award of process or the payment of damages be not required, *Aetna Life Insurance Company v. Howarth, 300 U. S. 227;* and it is not necessary that the proceedings should be entirely de novo *(Old Colony Trust Company v. Commission, 279 U. S. 716).* However, Texas cases have held such an action to be de novo, *Gulf Land Company v. Atlantic Refining Company, 134 Tex. 59; Railroad Commission v. Shell Oil Company, 139 Tex. 66.* In order for a "case" or "controversy" to be presented it is not required that it be done by traditional forms or procedure, invoking only traditional remedies. *N. C. & St. L. Railway Company v. Wallace, 288 U. S. 249.* Are Federal courts precluded from taking cognizance of such cases if the suit involves adversary proceedings that are real, not hypothetical, that would be finanlly determined by judgment? Id.

Discussion of Railroad Commission v. Pullman Company

The rationale of this court's holdings in the *Pullman* case is that adjudication of constitutional questions should be avoided where a definitive ruling by a state court would settle the matter by a decision of the state statutory

powers under which the Commission acted. The Federal court stayed its hand until the state court could determine the meaning of *Article 6445, R. C. S. 1925*, rather than give a forecast and not a determination of state law.

The power of the Railroad Commission to promulgate Rule 37 is not an issue. That it had such power is settled. The standards by which an attack is to be made upon an order of the Commission pursuant to Rule 37 has been prescribed by the Supreme Court of Texas in *Brown v. Humble Oil & Refining Company, 126 Tex. 296; Magnolia Petroleum Company v. Railroad Commission, 96 S. W. (2d) 273 (Sup. Ct.); Railroad Commission v. Magnolia Petroluem Company, 109 S. W. (2d) 967; Magnolia Petroleum Company v. New Process Production Company, 104 S. W. (2d) 1106 (Sup. Ct.); Railroad Commission v. Shell Oil Company, 139 Tex. 66; and Cook Drilling Company v. Gulf Oil Corporation, 161 S. W. (2d) 1035 (Sup. Ct.)*

The validity and effect of state statute, Commission's rule thereunder and orders pursuant thereto having been judicially determined by state court of last resort, no reason obtains why the rule announced by this court in the *Pullman* case should apply.

Discussion of the Rowan & Nichols Case, 311 U. S. 614, 615

The rationale of this court's holding in the above cited case was that as it construed the decisions of the state court they "do not make clear whether the local courts may exercise an independent judgment * * *". We submit that the Supreme Court of Texas has specifically held that in a suit to test the validity or legality of an order of the Commission, the trial is de novo, evidence is to be heard anew, in-

dependently of what was before the Commission, based upon conditions as they existed at the time the Commission acted. From this "independent hearing" or "independent review", the courts will exercise an "independent judgment" as to the validity of the order. That the courts will not substitute their judgment and discretion for that of the Commission does not mean that its judgment as to the validity or legality of the order under review is not an "independent judgment".

*Article 6023, R. C. S. 1925,** confers power and authority upon the Commission to regulate drilling of and production from oil and gas wells, and for that purpose to make and enforce rules and regulations. Having promulgated Rule 37, it has heretofore been shown that in passing upon an application thereunder, the Commission acts in a quasi-judicial capacity, and not purely administrative. The Commission has also promulgated a rule requiring motions for rehearing to be filed and passed upon before its jurisdiction terminates. When it has acted upon such motions for rehearing, its jurisdiction is at an end. There is nothing in Sections 8, 10 and 11 of *Article 6049(c), R. C. S. 1925,* evincing a purpose on the part of the Legislature to confer upon the courts a continuation of the administrative process. It has ended when the Commission finally acts. That the courts do not perform an administrative function is clearly shown by the holdings of the Supreme Court of Texas that courts will not substitute their findings and judgment for that of the Commission, and that if the Commission's order is reasonably supported by substantial evidence that the Commission's action will be affirmed. A

* Copied in Appendix.

court review is then purely judicial for the purpose of testing the validity or legality of the order under attack.

The state court of last resort having passed upon the powers of the Commission and the extent to which a court might go, there is no basis for application of the principles announced in the *Rowan & Nichols cases* to this case.

This Case was Correctly Decided by the Trial Court

Believing that the Federal District Court had the power to hear and determine this controversy, we re-refer the court to Point II under Brief for Petitioners accompanying the Petition for Writ of Certiorari. In addition thereto, we desire to call the court's attention to *Article 6042, R. C. S. 1925**, which makes all orders of the Commission as to any matter within its jurisdiction, prima facie evidence of their validity. *Section 8 of Article 6049(c), R. C. S. 1925*, also provides that in trials of suits making attack upon any order of the Commission, such order shall be deemed prima facie valid. At the conclusion of plaintiff's testimony in the trial court, these petitioners moved for judgment (R. 100) upon the ground that plaintiffs "have not overcome the prima facie validity of that order" (R. 101.) The court granted that motion and specifically found that plaintiffs had "failed to introduce sufficient evidence to justify the court in granting the relief prayed for against the order * * * complained of herein" (R. 50). It was accordingly adjudged that plaintiffs "take nothing by their suit, that all relief prayed for by said plaintiffs be denied", and that the defendants recover their costs. (R. 50.) This was not a dismissal merely because the court could

* Copied in Appendix.

not "substitute its judgment for that of the Commission anymore" (R. 102), but was a judicial determination that upon the case as presented plaintiff had failed to show itself entitled to the relief prayed.

For a discussion of the presumptive validity of an order of the Commission, see *United Gas Public Service Company v. State, 89 S. W. (2d) 1094* (writ refused by the Supreme Court of Texas, and affirmed by this court in *303 U. S. 123, 625)*. The prima facie validity is sufficient to sustain the order unless the evidence clearly showed it to be unreasonable and unjust. *Humble Oil & Refining Company v. Railroad Commission, 112 S. W. (2d) 222.*

At this point we direct the court's attention to the fact that this case was tried in the court below in accordance with all the rules as announced by the highest courts of Texas, in that what was before the Commission was not paraded before the trial court. The evidence was restricted (almost wholly) to conditions as they existed when the Commission acted. The order of the Commission was all that was presented from the Commission's files.

The evidence showed without dispute that based upon the eight-times area surrounding applicant's lease [the basis for determining density advantage or disadvantage as adopted in *Shell Oil Company v. Railroad Commission, 133 S. W. (2d) 791, 792*], the tract involved was at a 37½% density or drainage disadvantage. (R. 91-92.)

The evidence further showed that respondents' lease would, under the West-East migration, drain approximately 75% of the oil from under the lease of these Petitioners. (R. 97.)

It is therefore, respectfully submitted that the judgment of the Fifth Circuit Court of Appeals should be reversed and that the judgment of the trial court shoud be affirmed.

Respectfully submitted,

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A copy of the foregoing Argument has been delivered to all opposing counsel.

W. EDWARD LEE,
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APPENDIX

Art. 6023. Jurisdiction

Power and authority are hereby conferred upon the Railroad Commission of Texas, over all common carrier pipe lines conveying oil or gas in Texas, and over all oil and gas wells in Texas, and over all persons, associations or corporations owning or operating pipe lines in Texas, and over all persons, associations and corporations owning or engaged in drilling or operating oil or gas wells in Texas; and all such persons, associations and corporations and their pipe lines, oil and gas wells are subject to the jurisdiction conferred by law upon the Commission, and the Commission is authorized and empowered to make all necessary rules and regulations for the government and regulation of such persons, associations and corporations and their operations, and the Attorney General shall enforce the provisions of this title by injunction or other adequate remedy and as otherwise provided by law. The word "Commission," as used in this title, shall mean the Railroad Commission of Texas. The word "Commissioner" shall mean any member of the Railroad Commission.

Art. 6042. Powers not limited

Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity.

Art. 6049c Oil and gas conservation, powers and duties of Railroad Commission

Suits authorized by persons aggrieved by Commissions' regulations or orders

Sec. 8. Any interested person affected by the consrvation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made of promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, s. 7; Acts 1935, 44th Leg., p. 180, ch. 76, s. 14.)

Notice of Commission as condition precedent to injunction; procedure

Sec. 10. No injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, shall be granted against the Railroad Commission, its members, agents, and representatives, to restrain it or them from enforcing any

rule, regulation, or order made and promulgated by the Railroad Commission under the conservation statutes of this State relating to oil and gas, or any amendments thereof, or restrain the enforcement of any such statute, except after notice to the Commission and a hearing as hereinafter provided; provided that when a petition or application is filed asking for any such character of temporary injunctive relief, the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing, which notice shall contain the docket number, style, and a brief statement of the nature of such suit, and such notice shall be served on the Commission by delivering a copy of such citation to the Commission or any member thereof, or to the Secretary thereof, in Travis County, for the service of other citations, and five (5) days from and after the service of such notice a hearing may be had on such application; provided further that the rule, regulation, or order complained of shall be taken as prima facie valid and the use and introduction of the verified petition of plaintiff shall not be sufficient to overcome the prima facie validity of the rule, regulation, or order complained of, or to empower the court to grant any injunctive relief against the enforcement of said rule, regulation, or order; provided further, that before any order granting any character of injunctive relief against any such statute or against any such rule, regulation, or order of the Commission shall become effective the plaintiff shall be required by the court to execute a bond with good and sufficient sureties in an amount to be fixed by the court reasonably sufficient to indemnify all persons when* the

* So in enrolled bill. Probably should read "whom."

court may find from the facts proven will suffer damages by reason of the violation of the statute, rule, regulation, or order complained of, such persons to be named in the order of the judge when the amount of the bond is fixed by the court and entered of record; provided further, that the finding of the court that any party is likely to suffer damage shall not be admissible as evidence of damages in any suit on such bond. In determining the amount of such bond it shall be the duty of the judge to take into consideration all of the facts and circumstances surrounding the parties and the ability of the plaintiff to make such bond in order to determine the amount and the reasonableness thereof under the facts and circumstances. And bond made or executed by any bonding or surety company shall be by some company authorized to do business in Texas. Such bond shall be made payable and approved by the judge of said court and shall be for the use and benefit of and may be sued upon by all persons named in said order who may suffer damages by reason of the violations of such statute, rule, regulation or order. Upon motion and for good cause shown, the court, after notice to the parties, may from time to time increase or decerase the amount of such bond, and may add new beneficiaries, and may require new or additional sureties as the facts may justify. Any person interested in the subject matter may, in the discretion of the court, intervene in any such suit. All suits on such bonds shall be instituted within six (6) months from the date of the final determination of the validity in whole or in part of such rule, regulation, or order. (As amended Acts 1935, 44th Leg., p. 74, ch. 28, s. 1.)

Appeals advanced in appellate court; jurisdiction of Courts of Civil Appeals to issue writs

Sec. 11. After notice and hearing is had upon application for any such injunctive relief either party to said suit has the right of appeal from any judgment or order therein granting or refusing any injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, or from any order granting or overruling a motion to dissolve any such injunction. Said appeal shall at once be returnable to the appellate court and said action so appealed shall have precedence in said appellate court over all cases, proceedings, and causes of a different character therein pending. The provisions and requirements of *Article 4662, Revised Civil Statutes of 1925*, relating to temporary injunctions shall likewise apply to appeals from any order granting or refusing a temporary restraining order, or granting or overruling a motion to dissolve such temporary restraining order, under the provisions of this Act. In the Court of Civil Appeals such court shall immediately and at as early a date as possible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court, or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court.

The Courts of Civil Appeals and the judges thereof are hereby vested with jurisdiction to issue writs of prohibi-

tion, mandamus, and injunction to prevent the enforcement of any order or judgment of any trial court or judge granting any character of injunctive relief without notice and hearing in violation of the requirements of Section 10, Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by this Act. Whenever it shall appear that such requirements of said Section with respect to notice and hearing have not been complied with, upon proper application presented by the Railroad Commission to the Court of Civil Appeals having jurisdiction, the said Court of Civil Appeals shall be empowered and it shall be its duty to issue instanter the necessary writs of prohibition, mandamus, or injunction to prohibit and restrain the trial judge from enforcing or attempting to enforce the provisions of the injunction issued by him, and to prohibit and restrain the party or parties in whose favor such order has been entered from acting or attempting to act under the protection of said order or from violating the statute or the rule, regulation, or order of the Commission attacked. (As amended Acts 1935, 44th Leg., p. 74, ch. 28, s. 2.)